

## Beneficial Ownership: Current Trends

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This article critically studies case law on beneficial ownership in Spain, Switzerland, England, Canada and France to conclude that what seems to be the prevailing opinion (economic/substance-over-form analysis) of that term is not the one that best conforms the object and purpose of tax treaties. The minority opinion, represented by the Canadian *Prévost* judgements, is given attention as the most promising way to avoid some of the problems of the concept of beneficial ownership. Recent initiatives of international organizations (OECD, UN) affecting the concept of beneficial ownership are also considered to study other relevant issues in connection with beneficial ownership (liability of withholding agents when it is found that the person receiving income is not the beneficial owner, extension of the concept to other treaty articles) where clarification is needed.

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### 1. Introduction

Some years ago, the discussion of a panel of experts commenced by pointing out that there is still much uncertainty about the meaning of “beneficial ownership”, despite the importance of the concept for application of the dividends, interest and royalties articles of tax treaties (DTCs). [1] The same panel also noted that “there are remarkably few court cases on the tax treaty meaning of term”. [2] Today, uncertainty as to the meaning of “beneficial owner” still exists, but, as this article shows, in the last three or four years more and more case law on beneficial owner has appeared in different jurisdictions (and more cases are still in the pipeline). [3] To a certain point, it may be said that there is enough case law to know what the focus of discussion about beneficial ownership should be and where some light should be shed by the OECD or other international organizations, like the UN, on the meaning of the term.

In addition, both the OECD and the UN are doing work on “beneficial ownership” and several documents have been released which deal with such concept. A number of issues arise from the work of international organizations that are closely connected with the recent case law and the need to clarify the meaning of the term. Basically, those issues are the following: Is beneficial ownership a broad or narrow clause against treaty shopping? Should it be given an “economic” or “legal” meaning? Is it an attribution-of-income rule? If so, what is the relevant legislation (if any) to interpret the term (that of the source or the residence country)? Should it be extended to other articles of DTCs or simply be deleted, even from Art. 10 to 12 of the OECD and UN Models? What is (or should be) the liability of withholding agents if it is proved that the recipient of income is not the “beneficial owner”? The answer to these questions in the case law of different countries, as well as the author’s own opinion, are explained in the sections to follow. First, the position of beneficial ownership in different jurisdictions is studied. Second, some critical remarks are added and the work of international organizations on this issue is examined. It remains to be seen what the views of the OECD will be when it releases its paper on beneficial ownership in a (hopefully) not too distant future. [4]

### 2. Recent Judicial Decisions on the Concept of Beneficial Ownership

#### 2.1. Spain

It is interesting to first refer to how “beneficial owner” is interpreted by Spanish courts, since their judgements are less well-known internationally than those of other countries.

Spanish tax legislation does not define “beneficial owner”. Therefore, reference to domestic law must be discarded to attribute a meaning to the expression when used in Spanish DTCs. [5] Even when implementing EC Directives which use the term “beneficial owner”, the Spanish legislation has avoided the use of that expression. [6]

The judgement of the *Tribunal Económico-Administrativo Central* (TEAC) of 22 September 2000 is the first decision in Spain where the concept of beneficial ownership was an issue. [7] In both cases, the Spanish TEAC and *Audiencia Nacional* (AN) had to decide if foreign societies for the management of copyrights and author’s rights were “beneficial owners” in order to apply the reduced withholding tax rates for royalties of several Spanish DTCs. [8] The TEAC and AN ruled that foreign societies for the management of copyrights or author’s rights are “intermediaries or agents acting in the name of the holders of the right (the authors) and, since they do act on

behalf of copyright holders, they cannot be beneficial owners for the purposes of Spanish DTCs” (unless they prove that the authors in the name of whom they act are residents of the same state as the societies).

The decisions of the TEAC and AN are technically correct, but some points need attention:

- The TEAC and AN did not mention in the judgements what the OECD Model or the OECD Commentaries explain on the concept of beneficial ownership in Arts. 10 to 12. It is likely that the courts used OECD materials, but there is no reference to where they found the meaning of “beneficial owner”. It is clear, however, that domestic law was not applied.
- The concept of beneficial ownership the courts used revolves around the idea of “ultimate owner of the income”. The facts of the case probably led the TEAC and AN to focus on the “ultimate owner” of income, but it is likely they did not mean to convey the idea that the concept should be given an economic, as opposed to a legal, meaning.
- The TEAC and AN stressed that the societies receiving the royalties had no power to dispose of the income received – they could only manage the rights of other parties (the authors), and the real owners of the rights had not attributed further powers to the societies apart from those related to receiving the income in their name. It is interesting that the Spanish courts studied the powers of the societies from the point of view of the Spanish legislation on author’s rights, when, in our view, they should probably have referred to the powers they had under the legislation of their own country. Likely, the courts simply sought a way to facilitate their decision: they studied the contracts between the societies and the authors and concluded that the structure of the societies and the powers they had are analogous to those similar Spanish societies have under domestic legislation. The courts probably did not mean that when searching for the beneficial owner, the legislation of the source state is relevant.

To sum up, it seems that these decisions regard “beneficial ownership” as a rule on attribution of income – the income was obtained by the authors and not the societies – rather than a broad anti-avoidance clause inserted in DTCs.

However, the position of the TEAC and AN suffered a “mutation” in the Hungarian conduit cases, which were released in 2006-2007. These are a group of judgements of the AN [9] which refer to very similar structures used by a well-known soccer club, Real Madrid (RM), and not less notorious soccer players. RM paid certain amounts to several Hungarian entities for the use or the right to use “image rights” of some soccer players with whom RM had a work contract or, if the player had registered his name as a brand, the payments were for the use or the right to use such brand. [10] The Hungarian entities, in turn, transferred almost the full income received [11] to entities which were residents of the Netherlands or Cyprus. The use of Hungarian entities had a clear goal: the [DTC between Hungary and Spain](#) is a well-known exit route for royalties, since it is (together with the [DTC with Bulgaria](#)) the only DTC in the Spanish treaty network with no withholding tax for royalties at source. [12]

In all the judgements the main issue [13] was whether the Hungarian entity receiving and making payments could be regarded as beneficial owner for the purposes of the [Hungary–Spain DTC](#). The Spanish tax administration concluded that the interposed entity in Hungary was not a beneficial owner because it paid almost all the “royalties” received to non-Hungarian (Netherlands or Cypriot) resident companies. [14] The fact that the Hungarian entity only retained a small part of the royalty (between 2% and 0.5%) and the clear link between payments received and made (which were on the same date or one day after having received the payment) were crucial for the tax administration to conclude that the Hungarian entity was not the beneficial owner of the payments. Some of the circumstances the administration found out clearly were indicative that the position of the Hungarian conduits was very weak: there were no invoices between the principal companies and the Hungarian entities; despite having no invoices the royalty payments were made (sometimes at dates prior to those established in the contract, sometimes in amounts that were different from those foreseen in the contract); in some of the cases the date of signature of the contract between the Netherlands/Cypriot company and the Hungarian entity was later in time than the date of the contract between the Hungarian entity and RM, etc.

RM (the appellant) claimed that the tax administration founded its decision on the fact that most of the income received by the Hungarian conduits was paid to a third party, but did not give any argument as to whether (or not) the Hungarian entities were the legal owners of the royalties received. Therefore, the fact that most of the income received was paid to a third party, RM contended, could not leave the Hungarian entities outside the scope of beneficial ownership as in the [DTC between Hungary and Spain](#).

The arguments the AN gave to exclude Hungarian entities from the beneficial-owner concept of Art. 12 of the Hungary–Spain DTC are the following:

- (1) The main purpose of the concept of beneficial owner is to prevent treaty shopping. In fact, the AN conceives of beneficial ownership as a clause with a (very) wide anti-treaty shopping effect. In the AN’s opinion, its

meaning and impact is analogous to the general domestic anti-abuse clause in the Spanish General Tax Law. [15] As a consequence, for the AN, the beneficial-ownership requirement permits the source country to exclude from the royalties article any situation where avoidance can be singled out, without the “bother” to apply the internal law procedure for these cases. [16]

- (2) For the AN, “beneficial owner” is a term with an autonomous international meaning. That is to say, this is a case where “context otherwise requires” and reference to internal law, according to Art. 3(2) of the OECD Model, must be excluded. The way the AN uses to “discover” such an international meaning is, to say the least, a bit peculiar. The AN followed the evolution of the concept of beneficial ownership in the OECD Model and its Commentaries, as well as in other OECD materials (the Conduit Report). [17] But, it misunderstood such evolution. In the view of the AN, the 2003 changes to the OECD Commentaries on Art. 10 to 12 confirmed the “clear” goal of the concept of beneficial ownership, i.e. its function as a wide anti-treaty shopping device oriented to tackle any form of treaty shopping. After the changes in 2003 of the OECD Commentaries on Arts. 10 to 12, according to the AN, an “economic interpretation” can be used to seek the “real owner” of income [18] (and, therefore, disregard the legal owner thereof). In fact, the AN assimilates “beneficial ownership” to a “business purpose test”: if there is a business reason to place an entity between the payer and the final recipient of the income beyond reduction of withholding taxes in Spain, the intermediary will be the beneficial owner – if the conduit has the only goal of reducing withholding taxes, it will fall outside that concept. [19]
- (3) The AN did not take into account the legal powers the recipient had over the royalties received. Rather, it presumed that since the Hungarian entities received and immediately paid “royalties” out to Netherlands or Cypriot companies, they did not have any control over the income. Therefore, the decisions lack an analysis of whether the Hungarian entities could be the legal owners of the income, whether (or not) the royalties could be legally attributed to them or if they assumed any risk in the transactions at issue, no matter the legal obligations that Hungarian entities had with third parties.
- (4) The AN applied the 2003 OECD Commentaries, as well as the 1986 OECD Conduit Report, to the [1984 Hungary–Spain DTC](#), but it did not even dedicate a word of its judgements to explain why later Commentaries or OECD materials could be used to interpret previous DTCs.

The main conclusion that can be drawn from the judgements is that the Spanish tax administration and courts have aligned (without citing foreign decisions) with the trend to identify beneficial ownership with a broad anti-fraud or avoidance clause. The basis of the reasoning of the AN is an economic/substance-over-form analysis of the kind often found when applying general anti-avoidance clauses or judicially crafted theories on the abuse/avoidance of tax law. As it will be shown, the growing tendency in other jurisdictions (with the exception of Canada) is to attribute beneficial ownership a meaning similar to the one used by the Spanish AN. [20]

## 2.2. Switzerland

Some years before the judgements of the Spanish AN, the Swiss Federal Tax Appeals Commission decided on beneficial ownership in a judgement of 28 February 2001: *V SA*. [21] The facts of the case were relatively straightforward. A Luxembourg company (“Luxco”), which was controlled by two British companies, purchased from a US resident the full capital of a Swiss company. The purchase was financed (almost in full) with a loan obtained from one of its shareholders. Such participation was the only relevant asset of Luxco. In 1996 and 1997, it received dividends from the Swiss company and, when applying for the refund of taxes withheld at source, the Swiss tax authorities denied access to the reduced withholding tax rates of the [Luxembourg–Switzerland DTC](#). Other relevant facts are: (1) Luxco was not a holding company in Luxembourg benefiting from any special tax regime; (2) all revenues received from the Swiss subsidiary were used to pay interest and other charges; and (3) when asked by the Swiss authorities, surprisingly Luxco responded that it was not the beneficial owner of the dividends received.

The Swiss Commission noted that Art. 10(3) of the [1993 Luxembourg–Switzerland DTC](#) did not use the term “beneficial owner” but only referred to “beneficiary”. Using a grammatical interpretation, the Commission concluded that a company which transfers to a third person, in the form of deductible interest and charges, the dividends it receives without having the power to fully dispose of them is not the “beneficiary” of income. This definition of beneficiary, the Commission noted citing the 1986 OECD Conduit Report, is close to the concept of beneficial owner, which is the “person who economically has the benefit of an item of income”. [22] Such a concept “is not applicable to conduit companies like intermediaries between the debtor and the person who will ultimately receive the item of income”. Thus, Luxco could not be granted the refund requested since it was not a beneficiary or beneficial owner for the purposes of the [Luxembourg–Switzerland DTC](#).

While sharing the gist of the decision, Danon has criticized it is too focused on the right to “economically benefit from an item of income” rather than on economic control of the income. In this author’s view, the Swiss Commission should have focused on economic control of the income by Luxco, and absence of economic control

is evident since there is a “direct link or pre-existing connection” between the dividends received and the interest paid by Luxco. As a consequence, for Danon, the recipient of income will not be the beneficial owner when two cumulative circumstances are present: (1) there is a functional connection between assets and rights generating the revenues in the source state and the obligation according to which this revenue should be transferred or paid to a third party by the intermediary (this calls for an analysis of the economic reality of the transactions); and (2) the functional connection is “effective”, which means that the agent or intermediary does not have any control upon the income it receives and pays out. [23] As a consequence, Danon concludes, the beneficial-ownership requirement focuses on “economic control as such”, when the position of the “intermediary” is “from an economic perspective, comparable to that of an agent”. [24]

Some years later, the Swiss Commission released another decision on beneficial ownership on 3 March 2005: *X Holding ApS*, which was confirmed by the Swiss High Court on 11 November 2005. [25] This time the case referred to a direct conduit – a Danish holding company – which was set up in Denmark and controlled by a Guernsey company, in turn fully owned by a Bahamian company. The director and final shareholder of all of these was a resident of the Bahamas. The Swiss Court concluded that the Danish company was the beneficial owner of the dividends (it did not pay “deductible income” to third parties), but denied access to the nil withholding tax rate for dividends of the [Denmark–Switzerland DTC](#) by using Swiss internal anti-avoidance norms as a legal basis. Danon criticized the decision because, in his view, the Danish holding was not the beneficial owner of the dividends paid by the Swiss subsidiary and the decisions assimilated the beneficial-ownership concept to a base erosion test. Once again Danon misses in the decisions any reference to “economic control” of the dividends received. For this analysis, he points out, neither the structure or the activities of the holding should be taken into account, nor the fact that it pays all the dividends to its shareholder. Rather, what really matters is the “intensity of the attributes of ownership”, whether the position of the Danish holding can be (legally and economically) assimilated to that of an agent and if it has some power to autonomously decide what it will do with the dividends (in the case at issue, Danon held that the Danish company did not have the structure to take decisions on its own due to the fact that the will of the company was dominated by the ultimate shareholder). [26]

Therefore, it seems that Swiss courts use tests similar to those of the Spanish AN when deciding if a company meets the beneficial-ownership requirement, with the consequence that it is given a broad anti-avoidance meaning (similar to a base erosion test). Danon’s view and criticism of the decisions are interesting and well founded. However, he defends an economic analysis of the concept of beneficial ownership, which blurs any difference between a general anti-avoidance clause and the concept of beneficial ownership. [27]

### 2.3. United Kingdom: the *Indofood* decision and HMRC’s reaction

Some months before the first judgements of the Spanish AN, on 2 March 2006, the English Court of Appeals (Civil Division) gave its decision in (the civil, not tax) case *Indofood International Finance Ltd v. JP Morgan Chase Bank N.A. London Branch*. [28] The facts and reasoning in the judgement are already well known and I will only briefly summarize them to make a short comment on the position that the English Court and, later, the English tax administration adopted. [29] *Indofood* is not really about English law – it refers to what an Indonesian court would have done if confronted with the issue. The only connection with English law was the parties chose English courts to solve any dispute between them. An Indonesian parent company who wanted to raise funds in international markets for its activity, instead of issuing loan notes directly (a 20% withholding tax would have been levied in Indonesia), [30] did so through a Mauritian company, [31] with the effect that the withholding tax on interest paid to the Mauritian company was reduced in Indonesia to 10% under the [Indonesia–Mauritius DTC](#) (no withholding tax was levied in Mauritius on interest paid to the noteholders).

When the Indonesian government denounced the [1996 Indonesia–Mauritius DTC](#) in order to have it terminated with effect from 1 January 2005, the Indonesian parent company attempted to redeem the notes (not only because of the increase in withholding taxes but also due to the, at the time, high interest rate it was paying to the Mauritian company/noteholders). There was a clause in the agreement permitting the issuer of the notes to redeem them before the date initially foreseen in order to mitigate additional tax charges (the increased withholding tax after the DTC was terminated) unless there were “reasonable measures” which provided for an alternative solution. However, the trustee for the noteholders deemed that a “reasonable measure” would be to interpose a Netherlands company. Therefore, the English court had to decide whether replacement of the Mauritius special-purpose vehicle by a Netherlands company was such a measure. Only if the Netherlands company could be regarded as the beneficial owner of interest from Indonesian sources according to the [2002 Indonesia–Netherlands DTC](#) could *Indofood* not redeem the note.

Some factual circumstances are relevant to understand the case:

- (1) Payments received and made by the Mauritian/Netherlands company were tied, so that interest received by the bondholders was really the money or interest paid by the Indonesian company (in fact, one of the clauses of the contract prohibited the Mauritian company to pay interest with its own funds, other than the interest received from Indonesia). Moreover, there was no difference in the rate of interest on both loans.
- (2) The Mauritian/Netherlands company did not retain a spread that could fully justify the risks assumed; it was remunerated with a sort of "fee" or charge.
- (3) On paper, interest received by the Mauritian/Netherlands company was paid on the following day to the bondholders. However, as the Court explained, the parent company paid the sums due to the noteholders directly to their trustee (thus, the Mauritian subsidiary did not receive/make any payment).
- (4) An answer by the Indonesian Directorate-General for Taxation (DGT) of 24 June 2005 to a question by the Indonesian parent concluded that the interposition of a Netherlands company would be a case of improper use of the treaty. The DGT identified the beneficial-ownership concept with the substance-over-form principle of Indonesian law and an anti-abuse rule. As a consequence, a Netherlands conduit would not be the beneficial owner of interest from Indonesian sources. On 7 July 2005, the DGT issued a circular letter in which it identified "beneficial owner" with "the actual owner of income... either individual taxpayer or business entity taxpayer that has the full privilege to directly benefit from the income", and, therefore, "'special purpose vehicle' in the form of 'conduit company', 'paper box company', 'pass-through company' or other similar are not included in the 'beneficial owner' definition". [32]

The main findings of the Court are as follows:

- (1) The term "beneficial owner" "is to be given an international fiscal meaning not derived from the domestic laws of the contracting states". [33] This is really an important feature of the decision, which ruled out attributing to the term the meaning it has under English law. [34]
- (2) The concept of "beneficial owner" is "incompatible with that of the formal owner who does not have 'the full privilege to directly benefit from the income'". [35]
- (3) In finding the meaning of "beneficial owner", the Court looked at the "substance of the matter". Since both loans are tied and the intermediate company (Netherlands or Mauritian) has to pay that which it receives, "in practical terms it is impossible to conceive of any circumstances in which either the Issuer or Newco [the Netherlands company] could derive any 'direct benefit' from the interest payable to the Parent Guarantor except by funding its liability to the Principal Paying Agent or the Issuer respectively". In the Court's view, "[s]uch an exception can hardly be described as the 'full privilege' needed to qualify as the beneficial owner, rather the position of the Issuer and Newco equates to that of an 'administrator of the income'". As a matter of fact, one of the reasons why the Court of Appeal reversed the decision was because the assumption that an arm's length spread would be retained by the Netherlands company was incorrect. [36]
- (4) The Court also based its conclusion on the fact that this is consistent with the object and purpose of the DTCs (between Indonesia and Mauritius, on the one hand, and between Indonesia and the Netherlands, on the other). For the Court, relief from withholding tax would not have been afforded had they granted the loan directly to the parent company, which is an indication that the transaction fell outside the object and purpose of the DTC at issue.

There is some resemblance between the cases decided by the Spanish AN, the Swiss Federal Commission and *Indofood*. The *ratio decidendi* in all cases is that payments received and made were so closely tied that the intermediate company had to pay "that which it received". Like the AN or the Swiss Federal Commission, the English Court did not look at whether the Mauritian/Netherlands company was paying its own money or the money of others. [37] In our view, there was hardly any need to do so: (1) from a contractual perspective, it was clear that the Mauritian/Netherlands company did not have any right over the income it received, it had to pay what it received and could not use any other income to discharge its liabilities with the noteholders; (2) in fact, the Mauritian company did not receive any interest, since the Indonesian parent paid directly to the trustee of the noteholders. It seems to be implicit in the reasoning of the Court that if there had been any "spread" (which can only be justified if "risks" are assumed by the intermediate company), the conduit could be regarded as beneficial owner. As Baker puts it, "if beneficial ownership had any meaning at all, surely it would exclude the type of interposed entity which had no function whatsoever but to receive any income and pay on the identical amount of income: in fact, it had so little function that, according to the Court of Appeal, the actual flows of money missed it out completely". [38]

Less justified are some statements by the Court regarding "substance of the matter" (they remind of a substance-over-form analysis), where the Court resorted to the definition of beneficial ownership by the Indonesian DGT (since this definition does not make the meaning of "beneficial owner" more clear) [39] or where it thought that reduction of withholding of taxes by means of interposing an intermediate entity is contrary to the object and purpose of DTCs. These arguments give support to those who defend a broad interpretation of the term "beneficial owner", as assimilated to a general anti-avoidance clause. And in fact, these statements were picked up by the

English tax administration (HMRC) in order to give its peculiar understanding of the effects of *Indofood* in the United Kingdom. On 6 October 2006, HMRC released a Draft Guide [40] on the Impact of *Indofood*, which, later in time, was included in the International Manual of HMRC. [41] The good thing about the Guide is that it acknowledges the international meaning of “beneficial owner”; the problem is that it ends up by assimilating it – like the Spanish tax administration in the Hungarian conduit cases – to a broad anti-treaty shopping device which permits HMRC to attack any reduction of UK withholding taxes by using conduits. [42] It is surprising that the Guide focused its attention in the statements regarding *Indofood* on the object and purpose of DTCs and tried to draw conclusions from *Indofood* that go beyond the Court decision (and the “international meaning of the term”), especially because the Guide contradicts UK treaty policy of including specific anti-avoidance provisions in Arts. 10 to 12 of its tax treaties (“main purpose” clauses) as a means of combating treaty shopping. [43]

In sum, it seems that HMRC equated the term “beneficial owner” to a (broad) anti-treaty shopping clause by making an interpretation of *Indofood* that the English Court did not defend. It is true that some statements in *Indofood* give support to the position of HMRC, but is no less certain that *Indofood* probably concerned one case where the intermediary could be regarded as an “agent or nominee” and this is what the English Court took into account.

#### 2.4. France: *Royal Bank of Scotland*

*Royal Bank of Scotland* [44] is a well-known case of the French *Conseil d'Etat* which has caused some concern in the international tax community. [45] In November 1992, a US parent company sold to RBS the temporary usufruct of a number of preferred non-voting shares of its French fully owned subsidiary. The conditions of the sale were, as the *Conseil d'Etat* held, the most striking feature of the contract:

- (1) The price paid by RBS would be recovered in three years in the form of dividends paid by the French subsidiary. The dividend was predetermined on the date of the initial sale and RBS would receive the price paid plus a certain amount (which was calculated after the French withholding tax was applied and the French *avoir fiscal* refunded to RBS).
- (2) RBS did not assume any risk in the transaction since the US parent company (1) guaranteed that if the French subsidiary could not pay the predetermined dividends, it would do it, as well as a supplementary compensation if RBS did not receive the refund of the *avoir fiscal* from the French authorities; (2) would give all the financial support to the French subsidiary so that it could distribute the predetermined amount of dividends; and (3) was obliged to buy back the shares if the income of the French subsidiary did not reach an also predetermined amount in any trimester.

The aim of the transaction, which resembles a dividend stripping, was to gain access to the [1968 France–United Kingdom DTC](#). If dividends were received by the US parent, the *avoir fiscal* would not have been refunded, but by selling the usufruct to RBS the French tax liability was significantly reduced.

First, the French tax administration considered that RBS was not the beneficial owner of the dividends paid by the French subsidiary of the US company. The French tax administration deemed the price paid by RBS when purchasing the usufruct right to be the amount of net dividends guaranteed to RBS. Therefore, according to the French tax administration, RBS granted a loan to the US parent company and the benefit of RBS in the transaction was the *avoir fiscal*. The Court of Appeals of Paris ruled for the taxpayer, inter alia, because RBS could not be regarded as an agent or nominee and the tax administration did not show that the distribution of risks in the contract was abnormal. [46] However, the *Conseil d'Etat* considered that the distribution of risks in the usufruct contract sought to artificially hide the real transaction, i.e. a loan which would be reimbursed with the dividends paid by the French subsidiary. The main purpose of the contract was, for the *Conseil d'Etat*, to gain access to the [1968 France–United Kingdom DTC](#) and, therefore, to obtain the refund of the *avoir fiscal* in France (which was not available if dividends were directly paid to the US parent company). The *Conseil d'Etat* ruled that this use of the DTC was contrary to its object and purpose and that the beneficial owner of the dividends was not RBS but the US parent.

What is really interesting in the decision of the *Conseil d'Etat* is that:

- (1) The *Conseil d'Etat* adopted a factual/economic approach to disregard the temporary usufruct contract and convert it into a loan, which is inherent to substance-over-form doctrines. [47]
- (2) The conclusions of the Court are based not only on the beneficial-ownership provision but also on the French general domestic anti-abuse clause. It is not entirely clear if this is so because the *Conseil d'Etat* thought that the beneficial-ownership requirement is not sufficient to underpin a “substance-over-form approach” and deny access to the [1968 France–United Kingdom DTC](#) or, rather, because it treats the concepts of beneficial ownership and anti-treaty shopping clauses as equivalents. [48] The latter seems a plausible explanation,

since in his preparatory opinion of the judgement, the *Commissaire du Gouvernement* already defended a broad interpretation of the concept of beneficial ownership to also cover any form of treaty shopping. [49] In fact, this is also how some French commentators read the concept of beneficial ownership. [50]

As a consequence, it seems that in France beneficial ownership is given a meaning similar to that attributed to the term by the Spanish tax administration and courts, the Swiss courts and the English tax administration. The trend to identify beneficial ownership with a broad anti-avoidance clause seems to be gaining ground in all the countries studied so far.

## 2.5. Canada: the *Prévost* decisions

The approach to the concept of beneficial ownership by Canadian courts in the *Prévost* judgements has attracted worldwide interest, mainly because they represent an alternative view to theories such as those defended by Spanish, French, Swiss and, with some nuances, English courts. There are two *Prévost* judgements – first, the decision of 22 April 2008 by the Canadian Tax Court (CTC) [51] and, second, the confirmation of this judgement in appeal by the Canadian Federal Court of Appeal (CFCA) on 26 February 2009. [52]

Both judgements refer to the treatment of holding companies as beneficial owners. A Netherlands holding company received dividends in 1996-2001 from a Canadian wholly owned subsidiary. The Canadian tax authorities concluded that it did not have access to reduced withholding tax rates of the 1987 Canada–Netherlands DTC (as amended by subsequent protocols) because the beneficial owners of them were the Netherlands company's shareholders, Henlys (a resident of the United Kingdom) and Volvo (a resident of Sweden). Other relevant factual circumstances are the following: (1) there was a shareholders' contract according to which the Netherlands holding company would distribute at least 80% of its profits; (2) the substance of the Netherlands holding was minimal but enough to be a resident of the Netherlands; (3) the Netherlands holding company's single asset was the participation in the Canadian subsidiary; and (4) the directors of the Netherlands holding were also the directors of the Canadian subsidiary.

*Prévost* paid special attention to the opinion of two Netherlands expert witnesses (Van Weeghel, who has written extensively on improper use of DTCs, [53] and Raas, specializing in Netherlands corporate law). From the experts' opinions, it was clear to the CTC that the holding company would be the beneficial owner of the dividends received under Netherlands commercial and tax law and, no matter the shareholders' pact, there was no legally binding obligation for it to distribute 80% of its dividends. The CTC, after consulting internal law and the OECD materials, as well as, inter alia, the English *Indofood* case, [54] ruled in favour of the Netherlands holding. The CTC gave a narrow – but, in our opinion, fair – definition of beneficial owner, that is at odds with the jurisprudence of other countries. [55] In practice, *Prévost* left the meaning of beneficial ownership confined to something of an attribution-of-income rule. [56] The CTC gave a concept of beneficial ownership [57] and construed it from the perspective of Netherlands commercial and tax law, with the consequence that it disregarded the source country legislation and its anti-avoidance arsenal. Since according to Netherlands legislation, the holding company was the owner of the dividends (despite its minimal substance, there being no office or employees, the dividends were included in its profits and loss account, and until distributed they were an asset available to its creditors – there was no predetermined or automatic flow of funds to the Netherlands holding company's shareholders and no legal obligation for the company to pass the dividends on to them), the CFC concluded that it was the beneficial owner for the purposes of Art. 10(2) of the 1987 Canada–Netherlands DTC. [58] Another salient feature is that the CTC mainly paid attention to the 1977 Commentary on Art. 10 of the OECD Model [59] (those in force at the time the Canada–Netherlands DTC and its protocols were signed), although it probably also took into account the Commentary on Art. 10 as amended by the 2003 revision of the OECD Model, as well as the OECD Conduit Report.

The Canadian tax administration appealed the decision of the CTC. The main arguments it adduced were that the CTC gave the term “beneficial owner” the meaning it has in common law, thereby ignoring the meaning it has in civil and international law. However, on 26 February 2009, the CFCA upheld the judgement of the CTC. The CFCA, unlike the CTC, did attribute relevance to the OECD materials (the 2003 amendments in the Commentary on Art. 10 of the OECD Model) issued after the 1987 Canada–Netherlands DTC to interpret its Art. 10(2). For the CFCA, these materials “are eliciting [sic “elucidating”], rather than contradicting, views previously expressed” (Para. 12). [60] In this sense, the CFCA stressed that the CTC's formulation of the concept of beneficial ownership not only “emerges from the review of the general, technical and legal meanings of the terms”, but “most importantly”, it “accords with what is stated in the OECD Commentaries and in the Conduit Company Report” (Para. 14). The CFCA rejected the proposition by the tax administration to construe the concept to mean the person “who can, in fact, ultimately benefit from the dividend”, because this definition does not “appear

anywhere in the OECD documents” and would jeopardize the “certainty and stability that a tax treaty seeks to achieve” (Para. 15).

To sum up, the CFCA not only approved the concept of beneficial ownership the CTC gave in *Prévost*, but also pointed out that it is in conformity with the OECD materials (even if some of them are posterior to the treaty being interpreted) and, what is more important, rejected an economic interpretation of the term “beneficial owner” which could have the effect of turning this concept into a broad anti-avoidance clause. [61]

### 3. How Should the Beneficial Owner Be Interpreted?

#### 3.1. More analogies than divergences in different legal orders?

At first glance, one may be tempted to conclude that beneficial ownership is interpreted by tax administrations and courts very differently in the countries studied. However, this conclusion would, in our view, be erroneous since there are common points in those decisions which should be stressed and which add important nuances to the (never-ending) discussion about the meaning of beneficial ownership. In fact, as long as there are more similarities than divergences, some common understanding of the term may be found. Otherwise, if the meaning of the concept is so different that it puts in jeopardy the symmetrical application of DTCs by both contracting parties, the conclusion would be that the concept should either be clarified (by the OECD/UN) or, alternatively, deleted from DTCs. The next sections explore these issues.

#### 3.2. Towards an international tax meaning of the concept?

It is interesting that almost all the cases in the jurisdictions studied attribute or refer to an “international meaning” of the concept of beneficial ownership. In order to establish what its content is, all the courts go to the OECD Model and the OECD Conduit Report, [62] accepting the retroactive effect of either the 1986 Conduit Report or the 2003 OECD Commentaries on beneficial ownership (at least in some jurisdictions – Spain, Canada, England). [63]

It is not fully clear to what extent statements in judicial decisions about the international meaning of beneficial ownership have been influenced by the 2003 OECD Commentaries on beneficial ownership in Arts. 10, 11 and 12 of the OECD Model, [64] by lack of domestic law definition (or agreement in internal law on the meaning) of beneficial ownership or by the need to interpret DTCs symmetrically in both contracting states. A quick reading of the cases may lead the interpreter to conclude that the focus of discussion about beneficial ownership has shifted from internal to international law and that this concept, when used in DTCs, may have forever abandoned its link with the law of trusts or the law of the source state (this is a case where “context otherwise requires” and the rule of Art. 3(2) of the OECD Model cannot be applied). [65] It is surprising, however, to see that although courts in different countries speak about the international meaning of the concept of beneficial ownership, it has not fully cut its nexus with internal law (of the source or the residence state). In fact, most of the decisions (with the exception of *Prévost*) apply source country anti-abuse standards to attribute a meaning to beneficial ownership.

Confronted with this situation, a cynic would say that, if there were an international meaning of beneficial owner, courts/tax administrations in the countries studied are speaking different dialects which are so dissimilar from each other that mutual understanding is not facilitated. However, this would not be a fair reading of those judgements, since probably they have more in common than what it may at first sight seem to be the case. At most, “different dialects by courts and tax administrations” put pressure on the OECD/UN to try to clarify the concept (as it seems will happen in a – hopefully – not too distant future).

#### 3.3. Beneficial ownership: an economic or legal concept?

It is interesting that most of the judgements studied (with the important exception of *Prévost*) adopted an economic/substance-over-form approach to decide who the beneficial owner of income is. Apparently, for the courts in all the countries studied except Canada, the concept of beneficial ownership requires a search for the person who economically has the benefit of an item of income. Sometimes the courts state it overtly (judgements of the Spanish AN in the Hungarian conduits cases, and in Switzerland in the *V SA* case); [66] sometimes it is implicit in the decision (*Indofood*, with its references to the “substance of the matter”, or the *Conseil d'Etat* in *Royal Bank of Scotland* and its substance-over-form analysis). In fact, an economic approach to beneficial ownership has been defended by some legal scholars, [67] which deem the 2003 OECD Commentaries on Art. 10 to 12 to underpin this position. [68] Other recent OECD materials can also be used to defend this interpretation. [69]

However, despite the plain words in the judgements, it is arguable that all of them did an economic/substance-over-form analysis. At first sight they mention that beneficial ownership should be interpreted economically,

applying various different tests (correlation between income received and paid; powers of the intermediate vehicle; whether the income flowed through the intermediary or not, etc.), but in the end, in our view, what all the judgements (including *Prevost*), with the exception of *Royal Bank of Scotland*, did is a legal analysis of the factual circumstances: facts – and especially legal arrangements between the parties – were scrutinized to conclude in most of the cases (excluding *Prevost*) that the recipient's position is that of an agent/nominee and not that of a legal owner of the income. If one steps back for a moment and thinks about the outcome of the cases (except *Prevost* and, for other reasons, *Royal Bank of Scotland*), it is difficult to conclude that the Hungarian companies in the Spanish cases, Luxco in the Swiss *V SA* or the intermediate Mauritian/Netherlands company in *Indofood* are more than agents or nominees from a legal (not economic) point of view. No “economic” or “substance over form” analysis is needed to reach this conclusion, since a recharacterization of the legal relations or the analysis inherent to simulation cases is enough to conclude that what the parties are saying (income can be attributed to the “intermediary”) is different from what they in fact do (there is an agency–administration relationship rather than a legal entitlement of the intermediary to the income). [70] In our view, beneficial ownership is a legal issue, [71] not an economic one. [72] If economic analysis of the facts is introduced in the determination of the beneficial owner of income, the concept will be so wide its contours could hardly be differentiated from a general anti-avoidance measure (as happened in the *Royal Bank of Scotland* decision by the *Conseil d'Etat*). As will be explored below, neither the history nor a contextual interpretation of the expression supports the construction of beneficial ownership in an “economic”, as opposed to a legal, fashion. In this regard, it is not fully clear to what extent the original meaning of the concept in common law systems has led to misunderstandings in civil law legal orders – such as Spain – where the idea of full ownership has been (erroneously) identified with “economic interpretation”. The 1986 Conduit Report added to the confusion since (for instance, when it deals with beneficial ownership) reference is made to “economic interpretation”: “Thus the limitation is not available [referring to reduced withholding rates in Arts. 10 to 12 of the OECD Model] when, *economically*, it would benefit a person not entitled to it who interposed the conduit company as an intermediary between himself and the payer of the income” (Para. 14.b, emphasis added). The reference to “economically” was dropped in 2003 when the OECD Commentaries on beneficial ownership in Arts. 10 to 12 were further expanded.

As a consequence, one of the major problems of most of the decisions studied (with the exception of *Prevost*) is their tendency to resort to “economic interpretation”, when all that was needed in the cases they considered was probably no more than “legal interpretation”.

#### 3.4. Beneficial ownership: an anti-avoidance or attribution-of-income rule? Of which state?

The economic approach to the concept of beneficial ownership is the reason why tax administrations (e.g. HMRC in its reaction to *Indofood*) and courts (Spain; Switzerland especially in *V S*, or even *X holding ApS*; *Royal Bank of Scotland*; some statements in *Indofood*) in some countries deem it to be a broad anti-avoidance rule which can be used to attack any form of treaty shopping. But was that the goal of the beneficial-owner concept when introduced into the OECD Model and DTCs? Although its origins and how the concept found its way into the 1977 OECD MC are not fully clear, [73] it seems that the “beneficial-ownership requirement” was a clarification of the term “paid to” [74] and was aimed to deny the benefits of Arts. 10 to 12 to those who, although having a legal title to receive the income, had a loose connection with it because they acted as intermediaries, “such as an agent or nominee”. [75] Therefore, it seems that originally the term “beneficial owner” was a fundamental concept that explained the nexus between some items of income obtained in one state (dividends, interest and royalties) and the persons (the residents of the other contracting state) who deserved treaty protection. [76] Although it is true that Para. 10 of the 1977 OECD Commentary on Art. 1 also pointed out that some situations of improper use of DTCs can be tackled with the concept of beneficial ownership, [77] it seems that its original function was closer to that of an internal attribution-of-income rule, which determines who the person is that should be taxed (or benefit from a DTC in cases of no taxation, such as the situation of charities and pension funds in the United Kingdom, which motivated the inclusion of beneficial ownership to replace “subject-to-tax clauses”) because income can be attributed to them. Therefore, originally not any form of treaty shopping could be attacked with the term “beneficial owner” and it had more to do with an analysis of legal substance of ownership than with a clause aimed at finding the economic owner of dividends, interest or royalties. [78] Under this kind of analysis, interpretation of beneficial ownership as a clause that permits (general or specific) domestic anti-avoidance clauses to enter the context of DTCs is not justified and may even negatively affect not only the symmetrical application of DTCs, but also the rights of taxpayers under internal law. [79]

Allegedly, later OECD work confirms the narrow interpretation of beneficial ownership. First, the 1986 Conduit Report excluded some (but not all) “conduit companies” – those with narrow powers which render them a fiduciary or administrator acting on behalf of another party – from the scope of the beneficial-ownership concept. [80]

Second, the 2003 OECD Commentaries on Arts. 10 to 12 took over the conclusions of the 1986 Conduit Report and, unlike the Conduit Report, did not make any reference to “economic reality”. [81] Third, the OECD Partnership Report identifies beneficial ownership with attribution of income. [82] Fourth, the historical attitude of the OECD until 2003 of reluctance (or, at least, ambiguity) towards applying internal domestic anti-avoidance clauses in the context of DTCs may be taken as a confirmation that beneficial ownership was not a broad anti-avoidance clause. [83] Fifth, if any conduit could be attacked with the beneficial-ownership clause, Para. 13 et seq. of the OECD Commentary on Art. 1 – which explains the different approaches and clauses to be added to DTCs to counteract the use of conduits – does not make much sense. [84]

In this context, the tests some authors proposed to decide on beneficial ownership (e.g. the bankruptcy or catastrophe scenario) [85] are but tools to decide whether the recipient of dividends, interest or royalties is the “legal/real owner” (not or an intermediary or administrator such as an agent or nominee) of income, even if income flows to a third party which can be seen, under an anti-avoidance analysis, as the real economic owner. [86] Therefore, unlike in the case of anti-avoidance rules, the subjective intentions of the parties are irrelevant in the beneficial-ownership analysis, which is, in our opinion, only concerned with attributing income to a given person. [87]

This why, in our view, the Canadian *Prévost* decisions have adopted a correct approach. [88] Especially in the judgement of the CTC, the concept of beneficial ownership was construed as a sort of “attribution-of-income rule”. [89] A distinctive feature of *Prévost* is also that the Canadian courts based their judgements on what happened in the state of residence of the company receiving the dividends. [90] As long as the Netherlands BV could be regarded as the legal owner of income under Netherlands tax and commercial law, it fell within the concept of beneficial owner, despite the shareholders’ agreement.

The interpretation of beneficial ownership as a rule of attribution of income under the tax laws of the residence state also finds support in OECD materials, and best accommodates the object and purpose of DTCs (limitations of source country taxation in DTCs only make sense if income accrues to a resident of the other contracting state under its own legislation). [91] The fact that the OECD Commentaries on Arts. 10 to 12 devote some attention to beneficial ownership and do not refer to the general rule under Art. 3(2) (reference to source state legislation) is also indicative that this is a case where “context otherwise requires”, [92] and in this case “context” may require to look at the residence state legislation on attribution of income. [93]

Needless to say, this interpretation is not indisputable either. None of the decisions commented on in this article (with the exception of *Prévost*) consider in detail what happens in the tax/commercial law legislation of the state of residence. Rather, they usually focus on the source state position. In addition, the US tax administration has defended that “beneficial ownership” is an attribution-of-income rule under the source state legislation, with the anti-avoidance arsenal of the source state (including, among others, the 1995 Conduit Regulations) being an integral part of the attribution of income. [94] While the OECD Commentaries on Arts. 10 to 12, after 2003, provide some support to the construction of the beneficial-owner clause as a rule of attribution of income according to the legislation of the state of residence, [95] the OECD Commentary on Art. 1, on improper use of DTCs, after 2003 can also be used to defend the contrary (i.e. the US position), [96] as can some recent OECD work. [97]

Some contradictions are also evident in the construction of beneficial ownership as an attribution-of-income rule according to the laws of the state of residence:

- Some persons subject to tax in the state of residence may be regarded as beneficial owners and have access to DTCs even if for civil or commercial law purposes income does not accrue to them. [98] It may make sense to give treaty benefits to persons who are liable to tax in the state of residence, but it would be strange to regard as “beneficial owner” a person who is not the owner in civil law terms of income even if for tax purposes that income is attributed to such a person. If beneficial ownership is interpreted as “an attribution-of-income rule for tax purposes” in the state of residence, regardless of what happens with civil or commercial law rules, persons taxed in the state of residence would not be excluded from the protection of DTCs and the objective of eliminating double taxation may be achieved. Special cases where the person taxed is not the beneficial owner from a commercial or civil law point of view should probably be dealt with in special rules or articles of DTCs by the contracting states (or, alternatively, in interpretative mutual agreement procedures).
- Some entities/persons with legal personality but treated as transparent for tax purposes in the state of residence or some specific agreements (e.g. partnerships, trusts, specific types of company, etc.) will not have access to DTCs even if they are legally (from a civil or commercial law perspective) entitled to the income received. Once again one may wonder if this makes sense – it should be remembered in this regard that beneficial ownership found its way into UK DTCs to preserve the interests of the state of residence (the United Kingdom) and eliminate the rigours of subject-to-tax clauses and permit access to Arts. 10 and 11 to pension funds and charities. [99] Therefore, as a matter of principle, the fact that a person is exempt from tax should not

- preclude it from being considered the beneficial owner. The same reasoning may apply to some transparent entities/arrangements, although here the mismatch is probably caused by Art. 3(a) (definition of person) or 4 (Residence) of the OECD Model, because those entities/agreements are probably “beneficial owners” in the context of Arts. 10 to 12 of the OECD Model. [100] Including them within the scope of a DTC should probably require the addition of some modifications to the definition of “person” and “residence” in Arts. 3(a) and 4. [101]
- Another version of this conflict arises when looking at (general or specific) anti-avoidance clauses in the state of residence: should the source state accept the application of treaty relief when, for instance, CFC clauses of the state of residence produce the effect of attributing income to one of its residents even if that item of income was paid to a third person resident of another state (to whom that income is attributed for tax and civil law purposes in that state)? The answer to this question is probably that the source state should look to what the state of residence of the recipient of income does. However, under the approach to the beneficial owner as the person to whom income is attributed under the laws of its state of residence, it is doubtful whether the source state should apply the DTC with the state where the recipient of income is a resident or the DTC with the state that attributes the income to one of its residents (probably the interpretation of “paid to” in the DTC between the state of the payor and that of the recipient of income will lead to the application of that DTC). [102]

As Wheeler has pointed out, it should be acknowledged that treaty entitlement is a completely different issue from attribution of income under domestic law. With regard to treaty access it is not clear yet what the role of tax or civil law, or both, should be. It is also unclear, she adds, what the role of beneficial ownership, if any, should be, in the search of general rules on treaty entitlement. [103] In our opinion, one should not expect the beneficial-ownership concept either to resolve all the conflicts of attribution of income and treaty access – Arts. 3 and 4 are the best candidates here – or to create exceptions to the rule that it makes sense to grant treaty access where income may be subject to tax (even if not actually taxed) in the state of residence – special clauses should be used for this purpose – as long as the recipient of income is not an intermediary, such as an agent or nominee. Originally the role of “beneficial ownership” was both more modest and more basic: excluding from Arts. 10 to 12 of the OECD Model persons with access to DTCs whose (legal or factual) nexus with the income received was too weak. [104] This should be a basic rule permeating all the attribution-of-income articles in tax treaties: only those with a real nexus with income should be allowed to invoke the benefits of those articles.

For these purposes, provided there is no discussion that the recipient of an item of income is entitled to treaty benefits, the pragmatic approach of the Canadian courts in *Prévost* of looking at whether income could (in legal and tax terms) be attributed to the Netherlands holding company should, in our view, be applauded. [105] Additionally, this approach of Canadian courts has the advantage that the “ghost” of “economic interpretation” is definitively expelled from the body of “beneficial ownership”, which may also help reduce conflicts of attribution or, at least, will bring back the conflict of application of anti-abuse rules of the state of source to where it belongs, namely the discussion about application of anti-avoidance rules in a treaty context (and the OECD Commentary on Art. 1). It remains to be seen if the future OECD Report on beneficial ownership will go in this direction, or rather ends up by confirming the conclusions of most of the courts in the countries studied (Spain, France, Switzerland or, to a lesser extent, the United Kingdom) and turns “beneficial ownership” into a broad anti-avoidance clause. [106]

### **3.5. Should the beneficial ownership concept be extended to other articles of the OECD Model (the UN work on beneficial ownership)?**

In view of the problems the interpretation of “beneficial owner” presents in the case law of the countries studied, the answer to the question in the title of this section should probably be “no”. In the context of the UN Model, however, the convenience of extending the beneficial-ownership requirement to other articles of the UN Model (Arts. 21, 13.6, 22, 7 and 14) [107] or adding an article on beneficial ownership (even in the form of an alternative clause in the Commentary on Art. 1) has recently been considered recently. [108] The Report by Prof. Baker was not especially supportive of those solutions [109] and warned about the dangers of extending beneficial ownership to other articles of the convention. This, together with lack of consensus on the topic, may be the reason why the UN Committee of Experts on International Cooperation in Tax Matters did not adopt a final decision on beneficial ownership, its conclusions being limited to the fact that there is a need to refine (fine-tune) the concept. [110]

In our view, rather than extending the concept of beneficial ownership, it would simplify matters to eliminate any reference to it in Arts. 10 to 12 of the OECD and UN Models. After all, the term adds very little to “paid to” in Arts. 10 to 12 and doubts about its interpretation are giving rise to uncertainty in the application of DTCs. This solution would make sense, especially if it is taken into account that (1) courts in different countries tend to read “a beneficial-ownership clause” even in treaties or treaty provisions where no reference is made to that term (so if it is a fundamental principle of internal or treaty law, there is no need to have that principle only included in Arts. 10 to

12, since it is immanent in the interpretation and application of DTCs) and (2) the interests of source countries are sufficiently protected after the new Commentary on Art. 1 of the OECD Model was added in 2003 (or can be protected by adding special clauses to DTCs): once the application of domestic anti-abuse clauses is permitted in a treaty context, there is no need to bring them into a DTC through the beneficial-ownership concept. Probably, it would be enough to mention in the Commentary on Art. 1 of the OECD Model (or UN Model) on “improper use of the convention” that, as a matter of principle, a “special nexus” (in tax terms, civil law terms or both) is required between the person having access to a DTC and the income received (an independent treaty provision on “nexus”/attribution of income may also help clarify this issue).

### **3.6. Other challenges of the beneficial ownership concept**

#### **3.6.1. Beneficial ownership and withholding agents**

The judgements of the Spanish AN in the Hungarian conduits cases touch upon an important administrative issue connected with beneficial ownership. If the source country decides that the person receiving dividends, interest or royalties is not the beneficial owner, can the source country collect the increased withholding tax rates (as compared to those in the DTC which are deemed not applicable) from the withholding agent or even apply penalties to withholding agents when in a tax audit it is eventually found that the recipient of an item of income is not the beneficial owner? The answer the Spanish AN gave to this question was “yes”, because the Spanish legislation (in force at the time of the payments by Real Madrid or currently in force) permitted the administration to collect the tax from the withholding agent or, at the time, from the person jointly and severally liable together with the taxpayer. There is no possibility, in order to avoid paying the tax or the penalty, for withholding agents (or the person liable for the tax) to show that they behaved with the general standard care incumbent on a reasonable person to elude tax liability. This poses three problems.

First, if a penalty is attached to the behaviour of the withholding agent, it is up to the tax administration to show that there was some kind of negligence or guilt on the part of the withholding agent. Otherwise there is a risk that sanctions levied will be unconstitutional – at least in countries, like Spain, with normative constitutions with a bill of rights including “presumption of innocence” and other due-process rights applicable in administrative procedures. [111] Second, if no penalty is levied and the tax administration only collects the due tax (according to internal legislation or the DTC really applicable in view of the situation of the recipient), at least for those countries that form part of the European Union, the ECJ jurisprudence on VAT may offer some help in defending that, if the withholding agents conducted with due diligence, tax should not be collected from them. [112] It is obvious in this regard that the fact that the withholding agent is in possession of a certificate of residence in the other country of the recipient of income does not prove anything about their behaviour and the condition on which the recipient receives income from the withholding agent. But if the certificate states that the recipient of the income is the beneficial owner of it, then the withholding agent will have an alibi to escape tax liability. In our view, however, those kinds of certificates are not valid to prove beneficial ownership of the recipient of income because the condition of beneficial ownership will only be known by a tax administration after a tax audit and not prior to one or when the income is paid. Due diligence is the only standard that can be used to attribute tax liability to withholding agents when DTCs are applied to persons that are not the beneficial owners. Third, the broader the interpretation of the beneficial-ownership clause, the more reluctant the withholding agent will be to apply Arts. 10 to 12 of the OECD Model, especially in borderline situations, since they will risk assuming, in the source country, the tax liability which corresponds to the taxpayer. [113]

In the end, what the latter reveals is that the beneficial-owner clause has a lot to do with the smooth/certain application of DTCs; probably some common guidelines on these administrative issues (tax liability, standard of due diligence by the withholding agent when appreciating beneficial ownership, consequences in the case of mistakes of appreciation, etc.) should be given by the OECD (or the UN). [114]

#### **3.6.2. Beneficial ownership and financial intermediaries (the recent OECD work)**

The issue dealt with in the previous section is directly connected with the OECD's recent work on access to DTC relief for investors operating through (professional) intermediaries. [115] The Report is addressed at facilitating treaty access to (mainly) portfolio investors who use professional intermediaries. It is interesting that the Report, however, does not touch upon the crucial issue of beneficial ownership, even where it deals with the issue of liability of intermediaries for underreporting of withholding taxes in the source state. [116] Despite its conclusions that “much work needs to be done” before “a sufficiently reliable, practical solution to the problem of collection of underwithholding” is found (Para. 109), it acknowledges that liability of the withholding agent or intermediary will depend on “industry standards”, “good faith” and “reason to know” rules with respect to the specific function the

intermediary performs (e.g. the liability of an intermediary in direct contact with the client cannot be the same as that of an intermediary which relies on the information provided by the last intermediary in the chain) (Para. 110 et seq.). Therefore, “strict liability” for underwithholding should not be the rule when the ultimate owner of the income (interest, dividends) does not have any right to apply the relevant DTC; the penalty should not always be, although it may include, the payment of the tax underwithheld (e.g. withdrawal of the licence to operate in a country could also be an effective sanction in relevant cases). [117]

If the whole system is to work smoothly, a financial intermediary in direct contact with the client should know what beneficial ownership means, how it should be established and according to the laws of which state. [118] It seems that the OECD Report relies on an (inexistent, as this work proves) well-settled concept of beneficial ownership or, simply, that the Report will be construed on the interpretation of beneficial ownership that the OECD will give in its, still due, report on this issue. What is clear is that the concept of beneficial ownership needs further fine-tuning (or to be replaced by other requirements that eliminate its uncertainty). The problem could also have another reading: will intermediaries (especially those in direct contact with the client) accept a “legal/tax” or “economic” concept of beneficial ownership? It can be argued that the liability of the intermediary does not depend on the meaning of the concept of beneficial ownership, since the intermediary will be also liable, if there is no due diligence, in cases of fraud or avoidance. But our guess is that for the intermediaries a legal/tax concept as the element that triggers liability is more palatable than the unpredictable consequences that economic interpretation of beneficial ownership could have. This is another reason to try to clarify the concept of beneficial ownership and interpret it narrowly.

In addition, the exclusion-of-liability principle when the intermediary conducted itself according to standards of due diligence in the appreciation of beneficial ownership should also be extended – with corresponding adjustments – to withholding agents outside the financial sector. This is, as explained in 3.6.1., also an issue in which a common position by the OECD is desirable [119] to provide certainty in the application of DTCs and avoid overwithholding in the source state.

#### 4. Conclusions

More than 30 years after it was introduced in the OECD Model, and despite the scholarly attention, the meaning of beneficial ownership still remains unclear. The problem was more or less theoretical until conflicts with tax administrations started to appear in different jurisdictions and decisions have been rendered by courts in several countries. These reveal, with the exception in *Prévost*, a growing trend to identify beneficial ownership with a broad anti-avoidance clause and to interpret the concept by reference to the legislation of the source country. An “economic interpretation/substance-over-form analysis” of the concept, in our view, does not conform with the history of the term, nor is it one that best serves the object and purpose of tax treaties. It also creates legal uncertainty for taxpayers and withholding agents. A legal approach to the concept seems to be preferable and will reduce the existing confusion. To achieve this, “beneficial ownership” should be detached from broad anti-avoidance clauses, although this does not seem to be the prevailing view in case law of the jurisdictions studied.

It is our impression also that the discussion about beneficial ownership should, at least, be separated from the conceptual problems that different rules on attribution of income pose. This is a question for Arts. 3 and 4 or special clauses to solve, the role of beneficial ownership being more modest. The extent to which the identification of beneficial ownership with an attribution-of-income rule may blur the conceptual problem of access to tax treaties is not fully clear, but it seems that deleting this clause in Arts. 10 to 12 and adding some comments to the OECD Commentary on Art. 1 (on the connection between income and the persons which, according to Art. 3 and 4 or special clauses, have treaty access) will, at least, mitigate the current uncertainty about “beneficial ownership”. Alternatively, the possibility of adding a new provision on “nexus” between items of income and the residents of the other state should be considered.

It is also interesting that the importance of beneficial ownership seems to be increasing in the context of two recent initiatives by international organizations. The opinion in the UN context that beneficial ownership should be extended to other articles of the UN Model will only lead to those articles having the same problems as the term presents in the context of Arts. 10 to 12 of the OECD and UN Models (and that is probably the reason why the UN Committee of Experts on International Cooperation in Tax Matters did not warmly receive the opinion).

The recent OECD work on financial intermediaries and collective investment vehicles also shows that beneficial ownership is relevant to avoid overwithholding in the source state and apply DTCs correctly. It is interesting that in this context – where clarification of the concept of beneficial ownership should be most important – the OECD has not sought to refine its meaning or determine whether it should be construed according to the laws of the source or

residence state. Rather, the new OECD materials reveal that there is no unanimity on how the term should be interpreted, and to some extent are contradictory with previous OECD work. This adds more pressure on the OECD to finally “clarify” the meaning of the term (something which is on the OECD’s agenda, although finding an agreement on this issue will not be easy). In this work, some thought should be given to the liability of financial intermediaries and, in general, withholding agents in connection with the beneficial-ownership requirement in order to eliminate uncertainty and overwithholding in the application of DTCs. It is our opinion that interpreting beneficial ownership as a broad anti-avoidance clause will not contribute to facilitating the application of DTCs. Some guidelines should probably be given on the tax liability of intermediaries/withholding agents and the standard of diligence which can be required from them when it turns out that the final recipient of an item of income is not its beneficial owner.

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1. Oliver, J., Libin, J., Van Weeghel, S., and Du Toit, C., “Beneficial Ownership and the OECD Model”, *British Tax Review* 1 (2001), p. 27 et seq. Also published as “Beneficial Ownership”, in 54 *Bulletin for International Fiscal Documentation* 7 (2000), p. 310 et seq. See also Wheeler, J. “The Attribution of Income to a Person for Tax Treaty Purposes”, 59 *Bulletin for International Fiscal Documentation* 11 (2005), pp. 478-479, and, of the same author, “General Report”, *Conflicts in the Attribution of Income to a Person*, Cahiers de droit fiscal international, Vol. 92b (Amersfoort: Sdu Fiscale & Financiële Uitgevers, 2007). On beneficial ownership, see Vogel, K., *On Double Taxation Conventions* (London: Kluwer, 1997), Preface to Arts. 10-12, Paras. 5-14; Van Weeghel, S., *The Improper Use of Tax Treaties* (Deventer: Kluwer, 1998), p. 64 et seq.; Du Toit, Ch., *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (Amsterdam: IBFD, 1999); Walser, J., “The Concept of Beneficial Ownership in Tax Treaties”, in IFA, *The OECD Model Convention – 1998 and Beyond (Proceedings of a Seminar held in London in 1998 during the 52nd Congress of the International Fiscal Association* (London: Kluwer Law International, 2000); Baker, P., *Double Taxation Conventions* (London: Sweet & Maxwell, 2000), Art. 10, Para. 10B-09 et seq.; Pijl, H., “The Definition of ‘Beneficial Owner’ under Dutch Law”, 54 *Bulletin for International Fiscal Documentation* 6 (2000), pp. 256-260; and, of the same author, “Beneficial Ownership and Second Tier Beneficial Owners in Tax Treaties of the Netherlands”, 31 *Intertax* 10 (2003), pp. 353-361; Danon, R., *Switzerland’s Direct and International Taxation of Private Express Trusts* (Zurich: Schulthess, 2004), p. 296 et seq., and, of the same author, “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, *IFF Forum für Steuerrecht* 1 (2007), pp. 38-55, “Le concept de bénéficiaire effective et les structures de relais direct”, 77 *Archives de Droit Fiscal Suisse*, pp. 105-117; Bernstein, J., “Beneficial Ownership: An International Perspective”, 47 *Tax Notes International* 17 (2007), pp. 1211-1216; De Broe, L., *International Tax Planning and Prevention of Abuse* (Amsterdam: IBFD, Doctoral Series 14, 2008), p. 654 et seq.
2. De Toit, in Oliver, Libin, Van Weeghel and Du Toit, note 1, p. 31.
3. The well-known *Market Maker* decision of the Dutch Supreme Court of 6 April 1994 is not discussed here. See, on this decision, for instance, Van Weeghel, note 1, p. 75 et seq.; Du Toit in Oliver, Libin, Van Weeghel and Du Toit, note 1, pp. 32-34; or Pijl, “The definition of ‘Beneficial Owner’ under Dutch Law”, note 1, pp. 257-58, De Broe, note 1, pp. 694-697, or the *Prévost* decisions commented on in 2.5.
4. The issue of “beneficial owner” under EC law is not dealt with in this article. While the concept may have a meaning similar – but not completely equal – to that in DTCs in the context of Directive 2003/49/EC (Interest and Royalties Directive), it has a completely different function in Directive 2003/48/EC (Savings Tax Directive), closer to the similar concept in anti-money laundering legislation and EC directives.
5. In general, Spanish tax law uses civil law criteria to attribute income to an individual or company. The concept of beneficial owner, as understood in trust law, is unknown in Spain. It is important to stress that, with regard to fiduciaries, Spanish jurisprudence, in situations where the concept of beneficial ownership was not an issue, has tended to attribute income received by fiduciaries to the real owners of it. See, for instance, the judgements of *Audiencia Nacional* (National Court) of 20 January 2005 and 29 April 2004.
6. Art. 25(1)(h) of the Spanish Non-Residents Income Tax Law, when implementing Directive 2003/49/EEC, instead of referring to the beneficial owner, conditions the application of reduced withholding taxes in Spain (under the grandfathering provisions of the Directive) to the fact that “the royalty is received by a company on its own behalf and not as a mere intermediary or authorized agent of another person or entity”. That is,

the implementing legislation tries to give a (not very faithful) description of what, in fact, the beneficial-owner concept is in the Directive. Something similar occurs with *Real Decreto* (Regulation) 1778/2004, which has implemented the Savings Tax Directive in Spain. Although the concept of beneficial owner is one of the three “pillars” of the Directive, the Regulation does not even mention this concept, but simply lists the cases where a person will not be the beneficial owner of interest. The concept of beneficial owner, however, is used in the agreements between Spain and the countries or territories affected by the Savings Tax Directive.

7. The decision of the TEAC was confirmed by the *Audiencia Nacional* (AN), a real court of justice, on 19 June 2003. The *Tribunal Económico-Administrativo Central* (TEAC) is not a real court, since it is functionally dependent on the Ministry of Economics and Finance. Appeals submitted by taxpayers against acts of the Spanish tax administration should be revised by administrative courts – either the central one (the TEAC) or regional ones (TEARs) However, it has been interpreted by the European Court of Justice that either the TEAC or TEARs can ask preliminary rulings. See ECJ, 21 February 2000, Cases C-110/98 to C-147/2008, *Gabalfrija S.L. y otros*, Paras. 33-41 or ECJ, 1 April 1993, Cases C-260/91 and C-261/91, *Diversint e Iberlacta*.
8. It is not very clear in the judgements to which DTCs they refer, but one of them was the [1990 Spain–United States DTC](#).
9. Judgements of the AN of 18 July 2006 (JUR\2006\204307, JUR\2007\8915 and JUR\2007\16549), 10 November 2006 (JUR\2006\284679), 20 July 2006 (JUR\2007\16526), 13 November 2006 (JUR\2006\284618) and 26 March 2007 (JUR\2007\101877). See, for a commentary of these judgements, Vega Borrego, “La utilización de sociedades húngaras para la cesión de derechos de imagen de futbolistas de equipos españoles y el concepto de beneficiario efectivo en los convenios para la eliminación de la doble imposición”, 21 *Revista Jurídica del Deporte* 3 (2007), pp. 185-204. All the judgements by the AN follow literally, by copying his arguments, the position of Vega Borrego, “El concepto de beneficiario efectivo en los Convenios para Evitar la Doble Imposición”, *Documentos del Instituto de Estudios Fiscales* 8/2005, and Vega Borrego, *Las medidas contra el “treaty Shopping”* (Madrid: Instituto de Estudios Fiscales, 2003).
10. Since, in the context of the judgements, both categories of income present almost the same problems, we will not differentiate between both types of income flows.
11. The percentage of income paid out to the Netherlands or Cypriot companies ranged between 98% and 99.5% of the payments received from RM.
12. In our view, payments for “image rights” cannot be characterized as royalties under Art. 12 of the OECD Model. See on this issue Martín Jiménez, “La tributación de los cánones o regalías”, in Ruiz García and Calderón (eds.), *Comentarios a los Convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España* (Coruña: Fundación Barriè de la Maza, 2004) p. 647 et seq. This view is neither shared by the Spanish tax administration nor by the *Audiencia Nacional*.
13. Other procedural issues were also considered in the cases; however, they will not be discussed here. From an international perspective, another important point was whether it was possible to request the withholding agent to pay over the withholding taxes when the administration has concluded in a tax audit process that the recipient of income was not the beneficial owner for the purposes of a DTC. We will come back to this issue in [3.6](#).
14. The consequences of that decision were different regarding Dutch or Cypriot entities. In structures with Dutch entities, the tax administration decided to levy the 6% withholding tax applicable to royalties in the [Netherlands–Spain DTC](#). Quite incomprehensively, the tax administration disregarded the Hungarian entity but concluded that the Dutch entity was the beneficial owner for the purposes of the Netherlands–Spain DTC. Such DTC does not have a beneficial-owner requirement in Arts. 10-12, so it is not clear whether the tax administration was concluding that beneficial ownership is not implicit in tax treaties which do not refer to that term or whether there was evidence that the Dutch entity was the beneficial owner of the “royalties”. In the case of Cypriot entities, there is no DTC between Cyprus and Spain (in fact, Cyprus is blacklisted as a tax haven in Royal Decree 1080/1991), and the domestic withholding tax rate in force at the time the facts took place (25%) was applied.
15. Art. 24 of the *Ley General Tributaria* (General Tax Law) of 1963, applicable to all the cases decided by the AN, and Art. 15 of the General Tax Law of 2003, which is currently in force.

16. In the old and the new Spanish General Tax Laws, declaration of tax avoidance had to follow a special procedure. Since 2003, that procedure requires the tax inspector to stop the tax audit and refer the case to a central commission, which will decide if there is avoidance or not (Arts. 15 and 159 General Tax Law).
17. Report “Double Tax Conventions and the Use of Conduit Companies”, adopted by the OECD Council on 27 November 1986 (“the Conduit Report”).
18. For the AN, the ownership of the income-generating asset is not relevant – what is really important is the link between the recipient and the income.
19. The Hungarian conduit cases are contradictory with some more recent judgements of the AN (judgements of 22 January 2009 and 16 June 2008), where the application of Directive 90/435/EEC (Parent-Subsidiary Directive) was excluded because the interposition between a US parent company and a Spanish subsidiary of a Dutch holding company lacked a valid “economic reason” (despite the substance of the Dutch subsidiary), but the [DTC between Spain and the Netherlands](#) was regarded as applicable to dividends paid by the Spanish company to its Dutch parent. In these decisions the AN did not consider the issue of beneficial ownership (the Netherlands–Spain DTC does not have such a clause), but it is undisputable that if it had not thought the income was attributable to the Dutch company, it would not have applied the Netherlands–Spain DTC (from the proceedings it can be inferred that the Spanish Tax Administration tried to apply the [Spain–United States DTC](#), which has a higher withholding tax for dividends than the Netherlands–Spain DTC). This is therefore a case where “beneficial ownership” is interpreted narrower than in internal anti-abuse clauses.
20. As far as we know, the judgements have been appealed before the Spanish Supreme Court.
21. The decision (or rather, the most relevant paragraphs of it) can be found in the IBFD’s *Tax Treaty Case Law Database*. The judgement is commented on in detail by Danon, “Le concept de bénéficiaire effectif dans le cadre du MC OCDE”, note 1, p. 58 et seq. That author basically reads this decision from the point of view of his theory on beneficial ownership, defended in Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, p. 326 et seq.
22. The Swiss Commission assumed that the concept of beneficial ownership is implicit in tax treaties which do not use it.
23. Danon, “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, note 1, pp. 45-46. This position is a development of the ideas of the same author previously expressed in his doctoral thesis: “the person who legally, economically or factually has the power to control the attribution of the income”. This definition differs essentially from the common law meaning of “beneficial ownership” in that it does not require that the recipient of the income be able to enjoy the economic benefits of the item received. Moreover, it is submitted that this meaning remains perfectly in line with the OECD Commentary and Conduit Report. Indeed, it excludes agents, nominees and conduit entities with narrow powers on the ground that these persons are not in a position to control the attribution of the income (being legally, economically or factually bound by the instructions of their principal, shareholders, participants, creditors, etc.) (Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, p. 340).
24. Danon, “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, note 1, pp. 45-46.
25. On the factual circumstances and legal reasoning of the judgements I have followed Danon, “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, note 1, p. 46 et seq., and “Le concept de bénéficiaire effective et les structures de relais direct”, note 1.
26. Danon, “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, note 1, pp. 48-49, and “Le concept de bénéficiaire effective et les structures de relais direct”, note 1, p. 115.
27. In fact, this assumption is made explicit when Danon (in “Le concept de bénéficiaire effective dans le cadre du MC OCDE”, note 1, p. 51), explains that the relationship between domestic general anti-abuse clauses and the beneficial-ownership requirement is one of subsidiarity: the former will only have effect in cases where the latter cannot be applicable. That is to say, he deems the beneficial-ownership requirement to be a “specific anti-avoidance clause” which has priority in its application over general anti-avoidance norms. His last work on this issue, however, while retaining part of his primary theory, seems to slide towards a less economic and more legal construction of the term “beneficial owner”; see Danon “Le concept de bénéficiaire effective et les structures de relais direct”, note 1.

28. [2006] EWCA Civ. 158, [2006] STC 1195; the full text of *Indofood* can be found in the IBFD's *Tax Treaty Case Law Database*.
29. On *Indofood* see, for instance, Fraser, R., and Oliver, J., "Treaty shopping and beneficial ownership: *Indofood International Finance Limited v. JP Morgan Chase Bank, N.A., London Branch*", *British Tax Review* 4 (2006), p. 422; Baker, P., "Beneficial Ownership: After *Indofood*", 6 *Grays Inn Tax Chamber Review* 1 (2007), p. 15; or Sheppard, L., "*Indofood* and *Bank of Scotland*: Who is the Beneficial Owner", 45 *Tax Notes International* 5 (2007), p. 406. See also De Broe, note 1, p. 706 et seq.
30. Interest was paid "net" of taxes (gross-up clause), so the withholding really was a cost for the issuer.
31. The Mauritian company issued the bonds and on-lent the funds raised to the Indonesian parent company. The Indonesian parent acted as guarantor of the issue.
32. *Indofood*, Paras. 18-19.
33. *Indofood*, Para. 42 (citing Prof. Baker's opinion and the OECD Commentaries 1977-2003, Arts. 10-12, as well as the 1986 OECD Conduit Report).
34. Baker, note 29, p. 23, pointed out in this regard that, if one were to applaud any point in *Indofood*, it is that it construed the term with an international, as opposed to a domestic law, meaning.
35. *Indofood*, Para. 42 (citing the Circular of the Indonesian DGT of 7 July 2005).
36. *Indofood*, Para. 40 (the "substance requirements" under Dutch law would be satisfied with a combination of "handling charges" and "paid-up equity capital").
37. See Fraser and Oliver, note 29, p. 427.
38. Baker, note 29, p. 25. See also De Broe, note 1, p. 712 for a similar opinion.
39. See, for the same opinion, Baker, note 29, p. 25.
40. For a critical review of the Draft Guide, see Fraser, R., and Oliver, J., "Beneficial Ownership: HMRC's Draft Guidance on Interpretation of the *Indofood* Decision", *British Tax Review* 1 (2007), p. 39.
41. See [www.hmrc.gov.uk/manuals/intmanual/INTM332050.htm](http://www.hmrc.gov.uk/manuals/intmanual/INTM332050.htm).
42. See Fraser and Oliver, note 40, for a similar view. Specially controversial is example 7 of the Guide, where the use of a Luxembourg company to channel a loan to a UK borrower from a country with no DTC with the United Kingdom is deemed to fall outside the term "beneficial owner" because "it is clear one of the main purposes of the Luxembourg company is to avoid the withholding tax which would be due" if payments were made directly to the company lending the funds to Luxco. In the example, Luxco was set up for this transaction, it has a small "turn" for administering the loan and the interest is "predetermined" to be passed on to the parent in a country with no DTC with the United Kingdom. As the quoted authors point out (p. 48), one of the problems in example 7 is that "predetermined" does not indicate anything as to the legal situation of Luxco and is so general a term that it can be used to attack any "conduit", including those cases where the conduit is the real owner of the income it receives.
43. Fraser and Oliver, note 40, p. 41 et seq.
44. Judgement of 29 December 2006, No. 283314 (RBS) (the full text of the case can be found in the IBFD *Tax Treaty Case Law Database*).
45. On RBS, see for instance, Austry, Gelin and Sorel, "Practical Effectiveness of Beneficial Ownership Clauses in France's Tax Treaties", 53 *Tax Notes International* 2 (2009), p. 151 et seq.; Gibert, B., and Ouamrane, Y., "Beneficial Ownership – A French Perspective", 48 *European Taxation* 1 (2008), p. 2 et seq.; Sheppard, note 29, pp.409-413; De Broe, note 1, p. 697. For reference to previous decisions in France, see Gibert and Ouamrane, p. 6, and De Broe, note 1, p. 697 et seq.
46. *Cour Administrative d'Appel de Paris*, No. 01PA04068, 23 May 2005 (available in the IBFD's *Tax Treaty Case Law Database*).
47. Sheppard, note 45, p. 410 (citing Michel Collet).
48. Gibert and Ouamrane, note 45, p. 9. For instance, these authors seem to regard beneficial ownership as a

clause permitting to attack treaty shopping in a wide sense.

49. See Gibert and Ouamrane, note 45, p. 8, for an unofficial translation of the main paragraphs of the opinion.
50. Gibert and Ouamrane, note 45, p. 8.
51. *Prévost Car Inc. v. The Queen*, 2008 TCJ 231 (TCC), available online at <<http://decision.tcc-cci.gc.ca/en/dn/2008/04.html>>. On this decision see Arnold, B., "Tax Treaty Monitor", 62 *Bulletin for International Taxation* 7 (2008), p. 263 for a brief but very interesting commentary; Kandev, M., "Treaty Shopping in Canada: The Door is (Still) Open", 62 *Bulletin for International Taxation* 10 (2008), p. 463. See also Danon, "Le concept de bénéficiaire effective et les structures de relais direct", note 1, p. 105.
52. *The Queen v. Prévost Cart Inc.*, 2009 FCA 57, available online at <<http://www.fca-caf.gc.ca>>. See on this decision Boidman, N., and Kandev, M., "Canadian Taxpayer Wins *Prévost* Appeal", 53 *Tax Notes International* 10 (2009), p. 862, or Bernstein and Summerhill, "Canada's *Prévost* Decision: the World is Watching", 53 *Tax Notes International* 11 (2009), p. 985; Arnold, B., "Tax Treaty Monitor", 63 *Bulletin for International Taxation* 5/6 (2009), pp. 175-176.
53. See note 1.
54. The legal basis of the decision is not very clear. The CTC ruled out adoption in the treaty context of the internal law meaning of beneficial owner, because this route might lead to confusion in view of the fact that the interpretation in Canada of the term is not evident either, but apart from that, the decision is not fully based on OECD materials or any other single source. Arnold (note 52, p. 175) believes that the CTC "derived the meaning of the term from Canadian domestic law".
55. Arnold, note 51, p. 263, and note 52, p. 175, and Kandev, note 51, p. 464.
56. See Arnold, note 51, p. 263 for a similar opinion.
57. For the CTC, beneficial owner is "the person who enjoys and assumes all the attributes of ownership" (*Prévost*, Para. 99). In the case of corporations, the corporate veil should not be lifted "unless the corporation is a conduit for another person and has absolutely no discretion to use or application of funds put through it as conduit, or has agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than that person instructs it" (Para. 100).
58. See especially Para. 102 et seq. in *Prévost*.
59. See *Prévost*, Para. 95.
60. This statement should probably be connected with the view of the CTCA as to when later Commentaries are relevant to interpret prior DTCs as expressed in Para. 11 of *Prévost*: "... later Commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered and when, of course, neither treaty partner has registered an objection to the new Commentaries".
61. Boidman and Kandev, note 52, p. 864, have noted in this regard that the CFCA "has swept aside notions of purposive economic substance analysis in concluding as it did in *Prévost* in favour of merely distinguishing between agents and principals". I do not share, however, their opinion that the OECD Conduit Report expanded the anti-avoidance scope of the beneficial-ownership concept and the CFCA rejected the OECD's expansionist view (as expressed in the Conduit Report and the 1986 Commentaries). It is true that the Conduit Report added some controversial references to "economic" interpretation of the term "beneficial owner", but, as it will be shown below, from the Report it can also be inferred that not all conduits are excluded from the benefits of DTCs.
62. Some authors have argued against attributing any relevance to the Conduit Report; see Pijl, note 1, p. 260.
63. The reason why the 2003 OECD Commentaries on Arts. 10-12 or the Conduit Company Report are attributed retroactive effect is not evident in all jurisdictions: in Spain nothing is explained in this respect by the AN, in Canada the CFCA explicitly mentioned their clarifying effect. Retroactivity of the 1977 Commentaries with regard to previous DTCs which do not have the term "beneficial owner" is also widely accepted; see, for instance, Walser, note 1, pp. 30-32.
64. As known, the 2003 OECD Commentaries on Arts. 10-12 explain that "The term 'beneficial owner' is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object

and purposes of the convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance” (Para. 12 OECD Commentary on Art. 10; similar statements can be found in the OECD Commentaries on Arts. 11 and 12).

65. As known, in the past the issue of whether “beneficial owner” takes its meaning from internal law under Art. 3.2 of the OECD Model has attracted much academic attention. Especially, Du Toit, note 1, has been an ardent defendant that the term takes its meaning from domestic law of common law states (even if he defends that it is a term of international tax law); see also Pijl, “Beneficial Ownership and Second Tier Beneficial Owners in Tax Treaties of the Netherlands”, note 1, p. 357. Other commentators argued the contrary: see, for instance, Van Weeghel, pp. 43-46, and Libin, pp. 46-48, in Oliver, Libin, Van Weeghel and Du Toit, note 1; Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, pp. 332-334; Avery Jones et al., “The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States”, 60 *Bulletin for International Taxation* 6 (2006), p. 247; De Broe, note 1, p. 668 et seq. – all in favour of giving the term a “contextual” meaning.
66. The approach of the Swiss Court has been different in *X Holding ApS*, where it seems to have attributed a legal meaning to “beneficial owner”.
67. See, for instance, Danon, note 1. Pijl, “The Definition of ‘Beneficial Owner’ under Dutch Law”, note 1, pp. 256-257, explains this is the approach followed by Dutch tax authorities. The approach by Vogel, note 1, Para. 9-10, is closer to economic interpretation, since he refers to beneficial owner as a question of “substance over form” and his test to determine beneficial ownership is not only “legal” but also “factual”.
68. After 2003, the OECD Commentary on Art. 10 indicates that the term is not to be used in “a narrow technical sense” (Para. 12) and that the analysis of the position of conduit companies should adopt a “factual approach” (“as a practical matter” is the expression used in Para. 12.1.). Identical statements can be found in the OECD Commentaries on Arts. 11 and 12 of the OECD Model.
69. See the Report of the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-Border Investors (ICG), “Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles”, Draft Report for the OECD’s Committee on Fiscal Affairs, 12 January 2009, available online at <<http://www.oecd.org/dataoecd/34/26/41974553>>, Para. 29, Para. 50 (new draft Commentary 6.12 on Art. 1 of the OECD Model) and especially Annex 1 (“OECD Draft Report on Granting Treaty Benefits to Collective Investment Vehicles”).
70. As Zimmer, F., “General Report: form and substance in tax law”, *Cahiers de droit fiscal international*, Vol. 87a, pp. 24-25 (online IBFD database), points out, “legal substance” is not to be assimilated with “economic substance” of a transaction, since “the concept of legal substance most often refers to the characterization which emerges from a close study of the rights and obligations in a legal relation ... the main function of the concept of legal substance is to point out that sham or simulation transactions and wrong legal characterizations by the taxpayer will be disregarded for tax purposes”. “Economic substance” is to be considered by applying anti-avoidance rules or doctrines.
71. See also the conclusions by Oliver in Oliver, Libin, Van Weeghel and Du Toit, note 1, p. 68; Du Toit, note 1, p. 227; Walser, note 1, pp. 17-18.
72. See Arnold, note 52, pp. 175-176; De Broe, note 1, p. 687 (referring to conduits); Walser, note 1, pp. 27-29; or Gouthière, comments on Walser, note 1, p. 24. The position that beneficial ownership is an “economic concept” has widespread acceptance: see, for instance, HJI Panayi, C., *Double Taxation, Tax Treaties, Treaty-Shopping and the European Community* (Alphen aan den Rijn: Kluwer Law International, 2007), p. 44 et seq.; Pijl, note 1; Danon, *Switzerland’s direct and international taxation of private express trusts*, note 1, especially p. 336 et seq. The position of the latter has progressively slipped from a pure economic position to a more legalistic one, in which he takes into account “legal analysis” but still preserving his old “economic” parlance: see Danon, note 1.
73. Avery Jones et al., note 65, p. 249, point out that the term was first introduced in UK treaties to mitigate the rigours of subject-to-tax clauses in the state of residence (the United Kingdom, probably) and permit charitable and pension funds of the United Kingdom to qualify for Arts. 10 and 11 of UK DTCs. In fact, a quick look at the UK DTCs of the 1960s confirms that “beneficial owner” was used as an alternative to subject-to-tax clauses; see, for instance, the [1966 Protocol to the 1945 United Kingdom–United States DTC](#) (allegedly the first treaty which referred to beneficial owner with regard to income) or the [1966 Protocol to the 1954 Switzerland–United Kingdom DTC](#). In some UK treaties both beneficial-ownership

and subject-to-tax clauses were used at the same time in different articles (see, for instance, the [1968 South Africa–United Kingdom DTC](#), where beneficial owner is used in Art. 9 (Dividends) but the concept was not included in Art. 10 (Interest) or 12 (Royalties), where subject-to-tax clauses were maintained). See also Du Toit, note 1, p. 189 et seq.

74. See, for instance, Fraser and Oliver, note 29, p. 45. Not all authors would agree with this interpretation of “paid to”; see, for instance, Danon, *Switzerland’s direct and international taxation of private express trusts*, note 1, p. 314 et seq.
75. Baker, P., Report “Possible Extension of Beneficial Ownership Concept”, presented at the Fourth Session of the UN Economic and Social Council, Committee of Experts on International Cooperation in Tax Matters, Geneva, 20-24 October 2008, available online at <http://www.un.org/esa/ffd/tax/fourthsession/index.htm>, p. 4 (“Baker UN Report”), indicates that beneficial ownership was introduced in the 1977 OECD Model at the request, amongst others, of the British delegation. They were concerned that under the 1963 Draft OECD Model access to Arts. 10-12 could be granted to agents or nominees. Vogel, note 1, Para. 6, also noted that the OECD Committee on Fiscal Affaires had originally considered making treaty benefits dependent on the payments being liable to tax in the state of residence (subject-to-tax clause), but this would have involved further complications and “beneficial owner” was finally agreed upon.
76. See Walser, note 1, p. 17.
77. Other data confirm this statement. For instance, the United Kingdom usually included in Arts. 10-12 of its DTCs in the 1960s/1970s specific anti-avoidance clauses so the observation of the British delegation could not be taken to mean that they deemed the beneficial-owner clause to tackle any “improper use” of DTCs.
78. See Walser, note 1, pp. 17-19; Gouthière, comments on Walser, note 1, pp. 19 and 26-27; De Broe, note 1, p. 680 et seq.; Baker, UN Report, note 75, for a similar opinion.
79. The AN decisions are a proof: by interpreting the beneficial-ownership requirement as a broad anti-avoidance rule similar in its effects to the domestic *fraus legis* clause, the Spanish tax administration, with the blessing of the Spanish courts, avoided the special procedure under internal law (Arts. 15 and 159 General Tax Law) to apply the domestic *fraus legis* clause. This, in itself, is an abuse of law, but by the tax administrations and courts, not by the taxpayer.
80. Baker, note 1, Para. 10B-10.4. Others, however, have identified the Conduit Report as an attack on any type of conduit: see for instance Boidman and Kandev, note. 52, p. 862.
81. Para. 12.1 of the OECD Commentaries 2003-2008 on Art. 10 provides as follows: “... a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties”. When referring to conduits the 1986 Conduit Report constantly invokes the “economic reality”, but even in the context of that Report, in our view, the concept of beneficial owner can be distinguished from the general concept of “conduit”.
82. OECD Report, “The Application of the OECD MC to Partnerships” (Paris: OECD, 1999), Para. 54.
83. The contradictions regarding this issue were evident in the different OECD works on this subject matter. See for instance Paras. 43-45 of the Conduit Report, where first the *pacta sunt servanda* principle was used to give protection to all companies of the other contracting state, even those “abusing the treaty”, but it is admitted, at the same time, that “substance-over-form approaches” can be used to protect the source state. It is curious that Para. 44, when referring to the possibility of applying internal anti-abuse clauses, implicitly assumes that they operate in situations where the beneficial-ownership requirement is met by the company receiving the income. Therefore, Para. 44 seems to admit that beneficial ownership is not addressed at any “conduit company”. On the contradictions/ambiguities in the OECD position about interaction of domestic anti-abuse clauses with DTCs, see Martín Jiménez, “Domestic Anti-Abuse Rules and Double Taxation Treaties (Part I)”, 56 *Bulletin of International Fiscal Documentation* 11 (2002), pp. 542-553, and “Domestic Anti-Abuse Rules and Double Taxation Treaties (Part II)”, 56 *Bulletin of International Fiscal Documentation* 12 (2002), pp. 620-627.
84. See Baker, UN Report, note 75, p. 9, for a similar argument. See, on conduits, Wheeler, note 1, p. 482 et seq.

85. See Baker, note 1, Para. 10B-15, where he wonders “what would happen if the recipient [of dividends, interest or royalties] went bankrupt before paying over the income to the intended ultimate recipient? If the ultimate recipient could claim the funds as its own, then the funds are properly regarded as already belonging to the ultimate recipient. If, however, the ultimate recipient would simply be one of the creditors of the actual recipient (if even that), then the funds properly belong to the actual recipient”.
86. The three-pronged strategy proposed by Vogel, and used by the OECD in recent works (see Annex 1 of the “OECD Draft Report on Granting Treaty Benefits to Collective Investment Vehicles”, note 69) is somehow ambiguous, like the position of that author regarding whether beneficial ownership is a legal or economic requirement. According to Vogel, note 1, Para. 9, “the ‘beneficial owner is he who is free to decide (1) whether or not the capital or other assets should be used or made available for use by other or (2) on how the yields therefrom should be used or (3) both”. Vogel’s position is confusing when he mentioned that beneficial ownership is a problem of “substance” and a problem of “fact” (Para. 8-10). He further added the concept that if a company is bound by its controlling shareholder’s decisions, its ownership may be formal, although if the subsidiary’s management can take decisions different from the will of the controlling shareholder, the company will be the beneficial owner even in cases where one single shareholder controls all its capital.
87. Du Toit, note 1, pp. 247-248; De Broe, note 1, p. 690.
88. Recent OECD materials seems to be moving, however, in the opposite direction; see Annex 1 to the “OECD Draft Report on Granting Treaty Benefits to Collective Investment Vehicles”, note 69, Para. 3, where it is stated that under Vogel’s test of beneficial ownership, “a conduit company normally fails because it normally does not have the ability to vary either its investments or its obligations”.
89. Arnold, note 51, p. 248, and note 52, pp. 175-176, when commenting about *Prévost*, indicated that the beneficial-owner requirement is a “fundamental rule of taxation” or “a basic concept relating to the identification of the appropriate person to tax”. This was the position of Walser, note 1, p. 17, who regarded “beneficial owner” “not as a term that needs defining under Art. 3 or elsewhere, but rather as a more fundamental treaty principle with respect to which there ought to be bilateral consensus”.
90. It seems that the Indonesian Tax Court, in a judgement of 14 March 2008 regarding the [Indonesia–Mauritius DTC](#), also reached the conclusion that “beneficial owner” is a term to be construed according to the laws of the state of residence (*Tax News Service*, 16 January 2009).
91. This was the position Ault defended when commenting on beneficial ownership; see Walser, note 1, pp. 21-22. See the OECD Report, “The Application of the OECD Model Tax Convention to Partnerships”, 20 January 1999 (Paris: OECD), Para. 52, where this principle is regarded as inherent in DTCs. Example 4 in the Report, Paras. 59-62, also interprets the beneficial-ownership requirement as a rule on attribution of income in the state of residence. This position was also held – although not by all authors – in Libin and Oliver in Oliver, Libin, Van Weeghel and Du Toit, note 1, pp. 60-65; De Broe, note 1, p. 693. Interpretation of beneficial ownership as an attribution-of-income rule will also permit “trusts/trustees”, partnerships subject to tax in their state of residence and other “entities” subject to tax to have access to a DTC when excluding them from a DTC may cause double taxation. See with regard to trusts, Prebble, “Trusts and Double Taxation Agreements”, 2 *eJournal of Tax Research* (2004), p. 192 et seq., and “Accumulation Trusts and Double Tax Conventions”, *British Tax Review* 1 (2001), p. 69 et seq.; or Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, especially Chap. 3. This last author, however, has argued against the construction of beneficial ownership as an attribution-of-income rule. In his opinion, the rule derives from other expressions (“paid to”/“derived”) used in the distributive rules of DTCs, while the beneficial-ownership requirement refers to (economic) control of the income. See Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, pp. 326-349, and “Le concept de bénéficiaire effective et les structures de relais direct”, note 1.
92. See Walser, note 1, p. 16 for a similar opinion.
93. Ault, when commenting on Walser, note 1, p. 17, pointed out that this result can be inferred either from a “contextual” interpretation of beneficial ownership or from a special rule “where it would be appropriate for the source country to look to the residence country treatment of beneficial ownership”.
94. See, for instance, the comments on Arts. 10.2, 11.1, 12.1 and 21.1 of the Technical Explanation attached to the 2006 US Model Tax Convention. The comments on the Technical Explanation (LOB clauses)

confirm the US position: “Article 22 and the anti-abuse provisions of domestic law complement each other, as Article 22 effectively determines whether an entity has a sufficient nexus to the Contracting State to be treated as a resident for treaty purposes, while domestic anti-abuse provisions (e.g., business purpose, substance-over-form, step transaction or conduit principles) determine whether a particular transaction should be recast in accordance with its substance. Thus, internal law principles of the source Contracting State may be applied to identify the beneficial owner of an item of income, and Article 22 then will be applied to the beneficial owner to determine if that person is entitled to the benefits of the Convention with respect to such income.” The position of the US tax administration was the opposite in the 1996 US Model Tax Treaty (see the comments in the Technical Explanation on Art. 10.2, 11.1 and 12.1; the views explained with regard to Art. 22 were, however, the same as with regard to the 2006 Model Tax Convention, which was contradictory with the views expressed in the context of Arts. 10-12 on the concept of beneficial ownership).

95. Para. 12.1 of the OECD Commentaries 2003-2008 on Art. 10 note the following: “The immediate recipient of the income in this situation [referring to an agent or nominee] qualifies as a resident but no potential double taxation arises as a consequence of that status *since the recipient is not treated as the owner of the income for tax purposes in the State of residence*” (emphasis added). Similar paragraphs are added in the OECD Commentaries on Arts. 11 and 12. Wheeler, note 1, p. 481 suggests that this reference may be to the law of the “intermediary’s state”. In our view, if the sentence is read *a contrario* it is referring to the state of residence of the owner of income, but it must be acknowledged that problems may arise if the attribution-of-income rules are different in the state of the intermediary and the state of residence of the “beneficial owner”.
96. See Para. 9.2 of the OECD Commentaries 2003-2008 on Art. 1, where it is stated that, since domestic anti-abuse rules are part of the internal rules which determine tax liability, they are not affected by DTCs. For criticism of this position, see Zimmer, “Domestic Anti-Avoidance Rules and Tax Treaties – Comment on Brian Arnold’s Article”, 59 *Bulletin for International Fiscal Documentation* 1 (2005), p. 25; and Wheeler, note 1, p. 487. It can also be argued the use of domestic anti-avoidance rules in a treaty context is a tool of last resort (see Para. 9.5 of the OECD Commentaries 2003-2008 on Art. 1), whereas the exclusion of intermediaries from agents and nominees is a primary rule in DTCs, so not all the rules on attribution of income of the source state can be applied immediately in treaty situations.
97. See the Report of the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-Border Investors on Possible Improvements to Procedures for Tax Relief for Cross-Border Investors, Draft Report for the OECD’s Committee on Fiscal Affairs, 12 January 2009, available online at <<http://www.oecd.org/dataoecd/34/19/41974569.pdf>>, Para. 34, where it is assumed that the residence country and the source country can apply different concepts of beneficial ownership, or Para. 93, where a source country beneficial-ownership concept is mentioned.
98. See for instance the example Danon (*Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, p. 347) uses of “grantor trusts” in the United States and Canada where income is attributed for tax purposes to the settlor even if the beneficiaries have a fixed right to receive the income on an arising basis. For other examples, see Wheeler, “General Report”, note 1, pp. 56-57.
99. Avery Jones et al., note 65, p. 249.
100. For an argument in favour of considering non-taxable entities as residents for Art. 4(1) of the OECD Model, see Lang, M., “Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law”, 55 *Bulletin for International Fiscal Documentation* 12 (2001), p. 597. However, while defending the pre-eminence of the law of the state of residence for Art. 4(1) of the OECD Model, he holds that Arts. 6 to 22 should follow the attribution-of-income rules of the state of source – a position this author does not share. See Danon, *Switzerland’s Direct and International Taxation of Private Express Trusts*, note 1, p. 319 et seq., for a convincing criticism of the opinion by Lang.
101. This is the approach adopted by the Draft OECD Report on Granting Treaty Benefits to Collective Investment Vehicles, note 69, especially Sec. IV, Paras. 20-27. However, in this Report, at Paras. 32-36, another solution is also explored: if the CIV does not have access to a DTC, investors of the CIV residing in countries with a treaty with the source country should be able to claim its benefits.
102. See, on conflicts of attribution from the perspective of the state of residence, Wheeler, “The Attribution of Income to a Person for Tax Treaty Purposes”, note 1, p. 485 et seq., and “General Report”, note 1, p. 50 et

seq.

103. Wheeler, "General Report", note 1, p. 56.
104. The Draft OECD Report on Granting Treaty Benefits to Collective Investment Vehicles, note 69, has concluded in the case of "collective investment vehicles" that they are in principle beneficial owners of the income they receive because "the managers perform significant functions that go beyond those performed by a nominee, agent or conduit". It should be noted, however, that their recommendations are limited to widely held CIVs, with a diversified portfolio of securities and subject to investor protection regulation in the country of residence (Para. 4). See also the new proposed Para. 6.12 to be added in the Commentaries on Art. 1 and Annex 1. The Report did not consider the treaty entitlement of "private equity funds, hedge funds or trusts that do not fall within the definition of CIV set out in this paragraph". The same principles should apply, in our view, to these other forms of CIV not considered in the Report.
105. After all, in an internal context, few would dispute that if the recipient of an item of income is not really entitled to it according to its status (e.g. it lacks legal personality) or its contractual obligations (e.g. it is clear that he acts as a de facto or legal administrator), that item of income should be included in the tax base of the real owner of it.
106. Some of the statements in Annex 1 ("Background Regarding the Meaning of 'Beneficial Owner' in Tax Treaties") of the Draft OECD Report on Granting Treaty Benefits to Collective Investment Vehicles, note 69, are vague in this regard. First, they arguably support the "anti-avoidance" approach, when, for instance, pointing out that "a conduit company therefore fails [to meet the beneficial ownership requirement] because it normally does not have the ability to vary either its investments or its obligations" (Para. 4). On the other hand, in Para. 9 it is pointed out that "it may be more appropriate to address treaty shopping concerns in other, more flexible, ways [than the beneficial owner concept]", which suggests a more narrow approach to the concept.
107. It is not clear why the Report did not consider beneficial-ownership issues from the perspective of Art. 23 of the UN Model, especially when it has a tax-sparing provision; see on this issue the case *Canada Inc. v. The Queen* before the Tax Court of Canada (not yet decided as far as I am aware of). I thank Brian Arnold for bringing this case to my attention.
108. See "Note by the Coordinator of the Subcommittee on Improper Use of treaties: proposed amendments", addressed to the Committee of Experts on International Tax Matters, Fourth Session, Geneva, 20-24 October 2008, E/C. 18/2008/CRP.2/Add.1, with Baker, UN Report, note 75, as an annex.
109. In fact, the ranking of preferred options by Baker, UN Report, note 75, was: (1) do nothing; (2) add the beneficial-ownership provision to Art. 21 only; (3) add the beneficial-ownership concept to Arts. 13.6 and 22.4; (4) add the beneficial-ownership concept to Art. 7, (5) add a free-standing beneficial-ownership limitation provision; or (6) add a free-standing beneficial-ownership provision included only in the Commentaries.
110. The Committee decided to (1) include Baker's report in the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries; (2) suggest that further consideration be given to the practical application of the concept, including how to certify beneficial ownership, (3) analyse cases and materials on the application of the concept in developing countries and (4) receive any feedback from the OECD's work on beneficial ownership. See the Report of the Fourth Session (20-24 October 2008) of the UN Committee of Experts on International Cooperation in Tax Matters, *Economic and Social Council*, Official Records, 2008, Supplement 25, available online at <http://www.un.org/esa/ffd/tax/fourthsession/index.htm>.
111. The fact that tax administrations should appreciate the "intentions" of taxpayers is not a universally accepted principle, but in countries where the right of defence or the right to be presumed innocent also apply in administrative procedures, the application of sanctions to withholding agents without at least showing that there is negligent behaviour may be unconstitutional.
112. On tax liability and constitutional as well as EC law issues, see Martín Jiménez, *Los supuestos de responsabilidad tributaria en la LGT* (Cizur Menor: Thomson-Aranzadi, 2007). On tax liability in the field of VAT, see ECJ, 11 May 2006, Case C-384/04, *Commissioners of Customs & Excise v. Federation of Technical Industries*, Para. 30 et seq., where the ECJ ruled that the general principles of EC law (legal certainty and proportionality) limit the powers of the Member States to create cases of strict liability where

the person made jointly and severally liable for a tax cannot prove they took every precaution that could be reasonably required from them. Whether this jurisprudence can be transferred to direct tax matters is still debatable (see ECJ, 9 November 2006, [Case C-433/04, Commission v. Belgium](#)), but because the decision is based on general principles of EC law it should certainly have effect with regard to direct taxes too. On withholding taxes, cases of joint and several liability and direct taxes in EC law, see ECJ, 3 October 2006, [Case C-290/04, Scorpio](#), Para. 33 et seq., and ECJ, 22 December 2008, [Case C-282/07, Truck Center](#), Para. 34 et seq.

113. Some statements in the recent Draft OECD Report on Possible Improvements to Procedures for Tax Relief for Cross-Border Investors, note 97, Para. 34, are surprising since it seems that the Group assumes that beneficial ownership cannot be interpreted uniformly in both the source and the residence country.
114. Apparently this issue is on the agenda of the UN Committee of Experts on International Cooperation in Tax Matters; see the Report of the Fourth Session (20-24 October 2008), Economic and Social Council, Official Records, 2008, Supplement 25, available online at <http://www.un.org/esa/ffd/tax/fourthsession/index.htm>.
115. See the Draft OECD Report on Possible Improvements to Procedures for Tax Relief For Cross-Border Investors, note 97.
116. See Para. 101 et seq. of the Draft Report on Possible Improvements to Procedures for Tax Relief For Cross-Border Investors, note 97.
117. The recommendation the Draft Report on Possible Improvements to Procedures for Tax Relief For Cross-Border Investors, note 97, makes in Paras. 135-136 is as follows: (1) specific and detailed procedures should be followed by intermediaries to establish investors' eligibility for treaty benefits, and (2) the procedures should be based on "standard contracts and agreements" (to be jointly developed by the OECD and the European Union).
118. The Draft Report on Possible Improvements to Procedures for Tax Relief For Cross-Border Investors, note 97, Paras. 142-144, recommends that (1) beneficial ownership be established on the basis of self-declarations by the "clients" in a standardized format that would be accepted by all or a large number of source countries; and (2) certificates issued by the residence country of the investor not address questions of treaty qualification (such as beneficial ownership).
119. This is not to say that the standard of diligence should be the same for a professional intermediary or for another person acting as withholding agent, but, rather, that the problem is similar for professional intermediaries (including professional withholding agents) and those not in the financial sector.